No. 85-1259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF AMICI CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION, ASSOCIATION OF TRIAL LAWYERS OF AMERICA, ARKANSAS TRIAL LAWYERS ASSOCIATION, GEORGIA TRIAL LAWYERS ASSOCIATION, ILLINOIS TRIAL LAWYERS ASSOCIATION, OKLAHOMA TRIAL LAWYERS ASSOCIATION, OREGON TRIAL LAWYERS ASSOCIATION, PENNSYLVANIA TRIAL LAWYERS ASSOCIATION, WESTERN TRIAL LAWYERS ASSOCIATION, WISCONSIN ACADEMY OF TRIAL LAWYERS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the defendant in a civil action instituted by the Government in a Federal District Court to recover substantial civil penalties (in this case the penalties sought were in excess of $22,000,000 and penalties received in excess of $300,000) under a federal statute is entitled to a trial by jury under the Seventh Amendment of the Constitution.

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INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.2 the Virginia Trial Lawyers Association, the Association of Trial Lawyers of America and the above-listed organizations file

this brief as amici curiae in support of the petitioner. Letters of consent from counsel for the parties have been filed with the clerk. The Trial Lawyers organizations are non-profit membership organizations dedicated to the advancement of the legal profession and the protection of the legal rights of all citizens of the United States and the states in which they reside. Their combined membership of more than 100,000 members regularly participate in trials in state and federal courts. Individually and collectively amici curiae are concerned for and intimately involved in the protection of litigants' constitutional rights, including their right to trial by jury. The Associations are compelled to speak out in this case which has resulted in the denial of the right to trial by jury to petitioner, a citizen of the Commonwealth of Virginia, by a Federal District Court.

Members of amici curiae and the citizens they have represented in the past, those they currently represent, and those they will represent in the future have a substantial interest in the preservation of the right to trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States. They will be adversely affected by a judicial decision which removes from this guarantee bestowed upon us by our forefathers the right of a citizen to be tried by a jury of his peers when government seeks to impose substantial civil penalties for the violation of a statute. The civil penalty provisions of the statute applicable in this case, and similar statutes of recent origin, can produce an end result just as devastating to the litigant as prosecution under the criminal penalty provisions.[1] It makes little difference that the citizen cannot be deprived of his liberty, when his government can destroy him economically and, as a result, he loses all of his wordly possessions.

[1] Petitioner cites approximately 195 federal statutes enacted since October 18, 1972 which permit the government to seek civil penalties in the courts. (Pet. 16 and Pet. App. 82a-100a).

STATEMENT

The Seventh Amendment to the Constitution of the United States guarantees the right of trial by jury in suits at common law where the value in controversy exceeds twenty dollars. The Court of Appeals in a two to one decision held that petitioner did not have a Seventh Amendment right to trial by jury in this case in which civil penalties in the amount of $325,000.00 were imposed by the District Court.[2] (Pet. App. 8a) Judge Warriner, dissenting, would have held the Seventh Amendment applicable and a jury trial required. (Pet. App. p. 19a-25a) Regrettably, the majority decision was not examined by the full court. The Petition For Re-Hearing En Banc was denied by a six to five vote. (Pet. App. 26a)

The decision of the court below frustrates the clear intent of the Seventh Amendment to the Constitution of the United States and several prior decisions of this Court. While these grounds are amply explained in the brief of the petitioner, amici curiae submit this brief to amplify several points, primarily the impact of the Court of Appeals decision on the members of amici and the citizens whose interests they represent.

SUMMARY OF ARGUMENT

We believe that the panel below misinterpreted prior decisions of this Court concluding that Congress could assign and vest in an administrative agency the right to find facts and assess penalties without violating the Seventh Amendment. Such an application of the previous decisions of this Court is an erroneous application to this case since the Clean Water Act did not provide for fact finding or penalty assessments by an administrative

[2] We have accepted petitioner's explanation that because he cannot restore the ditch to its original condition, having sold the property to others prior to any government action, his civil penalty will be $325,000.00 and not $75,000.00. (Pet. 7 note 9)

agency. The Act clearly provided that suits under the Act were to be brought in District Court. The panel below further disregarded centuries of judicial history and a substantial body of law that a suit for civil penalties is an action at law and clearly a right or remedy of the "sort typically enforced in an action at law" and erroneously concluded that the civil penalties constituted equitable relief when in fact such civil penalties are clearly "legal relief".

The decision of the Court of Appeals represents in our view a very substantial and dangerous diminution of the right to trial by jury in America. We agree with Judge Warriner's dissent that "there simply is no justification for denying trial by jury before the imposition of a fine that could devastate a person of even moderate means and could seriously damage all but a small percentage of citizenry of this nation." (Pet. App. p. 25a).

We note with concern the proliferation of statutes containing civil penalties and the government's option to elect proceeding under civil penalty provisions rather than criminal penalty provisions thus avoiding the more onerous burden of proof beyond a reasonable doubt required in criminal prosecution, permitting pretrial discovery against a defendant, and avoiding the Constitutional protections of the Fifth Amendment. To remove the last protection, the right to trial by jury, is an effective erosion of the congressionally intended distinction between a civil suit and a criminal prosecution. The difference will become of small importance to a defendant who would in fact be better off if prosecuted criminally.

ARGUMENT

A. THE COURT OF APPEALS ERRONEOUSLY DENIED PETITIONER HIS RIGHT TO TRIAL BY JURY ON THE GROUND OF CONGRESSIONAL DELEGATION TO AN ADMINISTRATIVE AGENCY WHEN NONE EXISTED UNDER THE CLEAN WATER ACT.

We believe that the majority of the Court of Appeals has erroneously interpreted prior decisions of this Court. The majority of the panel in the court below held that petitioner was not entitled to a jury trial because this Court in *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), left open the question of whether the Seventh Amendment has any application at all to government litigation. *Id.* at 449 n.6 (Pet. App. 9a) The majority's reliance upon precedent which established at most the limited proposition that Congress may vest in an administrative agency the right to find facts and assess a penalty without violating the Seventh Amendment disregards the facts of this case. In *Atlas Roofing Co.*, this Court held that the Seventh Amendment does not "prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." 430 U.S. at 450. In *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974), this Court made it clear that its prior decision in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), simply meant that the Seventh Amendment is generally inapplicable to administrative proceedings. The facts of the instant case do not support the majority's application of the law. Suit was initiated against petitioner in the District Court, not in an administrative agency. (Pet. App. p. 67a-74a) Congress did not provide for factfinding to be done or civil penalties to be assessed by an administrative agency under the Clean Water Act. To the contrary, Congress required in 33 U.S.C. Section 1319(b) that suits under the Clean Water

Act be brought in the District Courts. (Pet. App. p. 76a-77a) The District Court, not an administrative agency, imposed the $325,000 civil penalty against petitioner. This Court made it clear in *Atlas Roofing Co.* that under facts similar to those here, a jury is required.[3] 430 U.S. at 460.

The majority's reliance upon *Atlas Roofing*, *supra*, and *NLRB* v. *Jones & Laughlin Steel Corp.*, *supra*, for the proposition that the Seventh Amendment right to a jury trial is limited to suits in the nature of an action existing at common law when the Amendment was adopted, disregards this Court's clear pronouncement in *Curtis* v. *Loether*, *supra*, that the jury trial right is not so limited. The majority of the panel below was simply wrong.

This Court as early as 1830 in *Parson* v. *Bedford*, 28 U.S. 433, 446-447 (1830), and as recently as 1974 in *Curtis* v. *Loether*, 415 U.S. 189, 193 (1974), said that the right to trial by jury is not limited to actions at common law existing at the time of adoption of the Seventh Amendment. In *Curtis* v. *Loether*, 193, *supra*, this Court reaffirmed the basic principle enunciated by Mr. Justice Story in 1830 that, "although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of actions recognized at that time." The majority below also failed to appreciate the importance of not only the cause of action existing when the amendment was adopted, but also whether the relief existed at that time. Mr. Justice Marshall, ex-

[3] "That case indicates, as had *Hepner* v. *United States*, 213 U.S. 103, 53 L.Ed. 720, 29 S.Ct. 474 (1909), *that the Government could commit the enforcement of statutes and the imposition and collection of fines to the judiciary in which event Jury Trial would be required*, see also *United States* v. *Regan*, 232 U.S. 37, 58 L.Ed. 494, 34 S.Ct. 213 (1914), but that the United States could also validly opt for administrative enforcement, without judicial trials." *Atlas Roofing Co.*, 430 U.S. to 460 (emphasis added).

pressing the unanimous view of this Court in *Curtis* v. *Loether*, *supra*, at 195, states ". . . a jury trial must be available if the action involves *rights and remedies of the sort typically enforced in an action at law.*" (emphasis added).

The majority of the panel below thus disregarded over nine centuries of judicial history that, without question, a suit for civil penalties is "an action at law." The right to trial by jury in cases of civil penalties was obtained in the great charter of English liberties of 1215, the Magna Carta. Actions to collect civil penalties or fines, called amercements, were required by the Magna Carta to be tried by a jury. Civil penalty actions were tried in England with a jury at the time of enactment of the Seventh Amendment. *Calfraft* v. *Gibbs*, (5 Term Rep. 19) (1792). In 1776, prior to enactment of the Seventh Amendment, suits to impose civil penalties were held by the courts of England to be civil actions, indistinguishable from an action for money had and received, and therefore actions at common law, subject to the right of trial by jury. *Atcheson* v. *Everitt* (1 Cowper, 382, 391).

Although this court has never explicitly held that a suit initiated by the government to impose civil penalties requires a trial by jury upon demand under the Seventh Amendment, it should be by implication settled law, as this has been the practice in our country since adoption of the Seventh Amendment. We note petitioner's list of at least fourteen reported cases which have previously been decided by this and other courts involving civil penalties sought by the government which were tried by a jury. Most of these cases determined issues relating to procedural matters alleged to violate the jury trial right under the Seventh Amendment, i.e., whether criminal or civil, granting a directed verdict, granting a new trial, right to appeal, burden of proof and taking the case from the jury when the evidence was not disputed. Significantly, no case held, or even inferred, that the

jury trial right did not exist. To the contrary, in every case, it was presumed to exist and constituted the very foundation upon which the Court's decision in the case was made.

It would be an incredible jurisprudential oversight if for over two hundred years the right to a jury trial under the Seventh Amendment did not exist in civil penalty cases when, without it, the holding of this Court in each civil penalty case would have been moot and no mention of this possibility was ever made in the reported cases.

B. THE COURT OF APPEALS ERRONEOUSLY CHARACTERIZED A CIVIL PENALTY AS AN EQUITABLE RATHER THAN LEGAL REMEDY.

To the extent that the majority of the court below analogized the civil penalty imposed in this case to "traditional equitable relief" or a "package" of remedies permitting the jury trial to be circumvented (Pet. App. p. 9a-10a) it is clearly wrong. No authority can be found that the imposition of a civil penalty in the amount of $325,000.00 is equitable relief.[4] To the contrary, prior decisions of this Court and other courts leave little doubt that civil penalties are not equitable relief but are legal relief.[5]

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[4] The failure to cite authority for this proposition in the opinion of the majority of the Court below is significant. (Pet. App. 10a) We believe that no authority is cited because it simply does not exist. Perhaps the majority below mistakenly believed that the District Court was providing restitution. However, restitution is not the same as a civil penalty. See *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946).

[5] *Hepner* v. *United States*, 213 U.S. 103 (1909) (dictum); *United States* v. *Regan*, 232 U.S. 37 (1914) (dictum); *Porter* v. *Warner Holding Co., supra* (dictum); *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n, supra* (dictum); *United States* v. *J. B. Williams Co., supra; Connolly* v. *United States*, 149 F.2d 666 (9th Cir. 1945); J. Moore, J. Lucas and J. Wiches, Moore's Federal Practice paragraph 38.31[1] (2d ed. 1985), pp. 38-235, -236.

Even the District Court recognized that it was sitting both in equity and law (Pet. App. p. 59a). A civil penalty of such a substantial amount is most closely analogous to punitive damages in a civil case. This Court in *Curtis* v. *Loether*, 415 U.S. at 195, required a jury trial when punitive damages were awarded.[6] The District Court in this case made it clear that it intended the civil penalty to be punitive. (Pet. App. p. 61a)

Historically, courts of equity had jurisdiction only to address those cases for which no legal cause of action was available. This Court has held that the equity jurisdiction of the federal courts is limited to those equitable causes of action existing when the Constitution was enacted. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 164-166 (1939). However, the Seventh Amendment applies to actions unknown at the time that the Amendment was adopted and applies to new legal rights and legal remedies created if they are in the nature of actions triable under the common law, i.e., in contradistinction to equitable rights. *Curtis* v. *Loether*, 415 U.S. at 193. Accordingly, it is actions in equity which are limited at the time of the Amendment, and not common law actions. The majority opinion failed to appreciate this distinction and properly recognize that at civil penalty is a legal rather than an equitable remedy. (Pet. App. p. 8a)

To the extent that the majority of the court below would deny a jury trial because the civil penalty provision "intertwines with the imposition of traditional equitable relief," the majority is simply wrong. The statute itself in 33 U.S.C. Section 1319(b) makes a specific distinction between the equitable relief permitted and the civil penalty provisions found in 33 U.S.C. Section 1319 (d). Nothing in the legislative history supports a hold-

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[6] "As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." *Curtis* v. *Loether*, 415 U.S. at 195-196.

ing that the civil penalty provisions found in the statute are to be construed as "traditional equitable relief," nor is there any legislative history that would imply that a jury trial is to be denied when the government seeks civil penalties under the Clean Water Act. Absent any such clear direction from Congress, the courts are required to analogize the new legal duty and remedy sought to those "typically enforced in an action at law." *Curtis* v. *Loether*, 415 U.S. at 195. This Court has by clear implication left no doubt that civil penalties are not equitable in nature, are readily distinguishable from restitution, and therefore require a trial by jury. *Porter* v. *Warner Holding Co.*, 328 U.S. at 402. To the extent that the decision of the majority of the court below may be read to deny a jury trial when equitable and legal relief in the form of civil penalties are mixed, it would be diametrically opposed to this Court's prior decisions.[7]

C. THE DECISION OF THE COURT OF APPEALS REPRESENTS A SUBSTANTIAL AND DANGEROUS RETRACTION OF THE RIGHT TO TRIAL BY JURY IN AMERICA.

We note with concern petitioner's analysis of the proliferation of recently enacted federal statutes which provide for the imposition of civil penalties in the federal courts (Pet. App. p. 82a-100a). Even without such a substantial increase in the number of statutes providing for civil penalties, the sheer magnitude of the penalty imposed in this case is, we believe, sufficient to invoke the Seventh Amendment's protection. As pointed out by Judge Warriner in his dissent, "there simply is no justification for denying trial by jury before the imposition of a fine that could devastate a person of even moderate means and could seriously damage all but a small percentage of the citizenry of this nation". (Pet. App. p.

[7] *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), and *Ross* v. *Bernhard*, 396 U.S. 531 (1970).

25a) It is reasonable to assume that if petitioner could choose between a civil penalty of $325,000.00 or six months and one day in jail, his choice would be jail. Each day in jail would be worth $1,795.58. No one would seriously argue that the Sixth Amendment would not entitle petitioner to a jury trial if he were imprisoned for more than six months for the violation. *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974). Is it not then an incredible argument that he can be denied a jury trial when the imposition of a civil penalty could ruin him financially for the rest of his life but could not be denied trial by jury if his punishment were to spend six months and one day in jail?

In the instant case petitioner found himself at odds with the overwhelming power of a government that sought "civil penalties" that could have totalled more than 22 million dollars (Pet. 6, note 8). What real difference would it have made to the petitioner if the government had sought a fine under the criminal penalties provided for in the statute, 33 U.S.C. Section 1319(c), which could have made him liable for the payment of 55 million dollars? Given the ability to obtain civil penalties of such astronomical amounts, the enforcement efforts of the government will surely be limited to the collection of a civil penalty.

By opting for the civil penalty provisions of a statute, the government avoids the more onerous requirements which are encountered in a criminal prosecution with its obvious Sixth Amendment requirement for a jury trial. When the Fifth Amendment no longer applies, the government can, with the use of pre-trial discovery, require the defendant to produce documents and testify against himself in the civil case. The government no longer must concern itself with the presumption of innocence. Its case is measured by the less difficult preponderance of evidence standard rather than proof beyond a reasonable doubt. If the defendant's last protection, trial by jury, is eliminated, the technical distinction between a civil suit to

enforce a substantial civil penalty and a criminal prosetion will be of little importance to the defendant. The defendant would, in fact, be better off if he were prosecuted criminally. A criminal prosecution would provide him with more constitutional protection and if the government prevails and destroys him financially, at least he will be provided food and shelter while he is imprisoned. The need for the Seventh Amendment's protection is known to all trial lawyers, and candidly admitted by one of this Court's former brethren.[8]

Amici curiae believes that its unwavering commitment to the Seventh Amendment's right to trial by jury has substantial historical support. Nearly 200 years ago while extricating themselves from an oppressive government and forming a new government, our forefathers found the right of trial by jury in civil cases so important that they refused to ratify the Constitution until the Seventh Amendment was included.[9] Insistence upon inclusion of the Seventh Amendment was the culmination of a consistent belief in its necessity, and its deprivation by the tyrant is found in the Declaration of Independence.[10] Its inclusion in a document originally drafted by a Virginia planter-lawyer and signed by 56 leaders of the time, 24 of whom were lawyers and 2 of whom were judges, dispels the notion that it was insignificant

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[8] "In our own times, the jury often has served as a deterrent to ambitious officials who wish to crush before them those who stand in their way. From where I sit reviewing some 3,500 cases a year, I often see the arbitrariness of a judge sitting as the thirteenth juror. One can easily imagine the extent of his severity when he sits alone." The American Jury: A Justification, Tom C. Clark, Associate Justice, Supreme Court of the United States, 1 Vol. L. Rev. 1, 4-5 (1966).

[9] "The objection to the plan of the convention, which has met with most success in this state is relative to *the want of a constitutional provision for the trial by jury in civil cases.*" *The Federalist on the New Constitution*, Hamilton, Madison and May, written in the year 1788, Hallowell 1831, p. 411 (emphasis supplied).

[10] ". . . For depriving us, in many cases, of the benefits of Trial by jury:" Declaration of Independence.

and unnecessary. Petitioner and those similarly situated find themselves no less in need of the Seventh Amendment's protection than their forefathers.

CONCLUSION

For these reasons and those stated in the Brief of the Petitioner, the judgment of the court below should be reversed.

Respectfully submitted,

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